Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1510

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, *Petitioner,*

v.

WILLIAM R. BURKETT, JEFF R. LAIRD, JAMES M. PETERS, FLOY E. DAWSON, O. B. JOHNSTON III, and G. PHIL HARNEY, and WILLIAM R. BURKETT as United States Attorney for the Western District of Oklahoma, and CLYDE L. BICKERSTAFF, as Oklahoma District Director of Internal Revenue Service and DAVID HALL and JO EVANS HALL, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Stephen S. Chandler, Judge of the United States District Court for the Western District of Oklahoma, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on November 7, 1974. A petition for rehearing en banc

by the United States Court of Appeals for the Tenth Circuit was denied by that Court on January 29, 1975.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit and the denial of the petition for rehearing and suggestion for rehearing en banc of that court are contained in Appendix A to this brief and said opinion is reported in 505 F.2d 217.

JURISDICTION OF THIS COURT

The statutory provision conferring jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit by writ of certiorari is contained in 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

Petitioner, as a United States District Judge, in certain proceedings pending before him involving investigation by the Justice Department and the Internal Revenue Service of possible income tax evasion by then Governor Hall of Oklahoma, entered a judgment of disbarment whereby petitioner disbarred the United States Attorney for the Western District of Oklahoma, certain members of his staff and a senior attorney of the Internal Revenue Service office of Regional Counsel. Petitioner also entered an order holding same attorneys in contempt of his court for their conduct in his court. The United States Court of Appeals for the Tenth Circuit reviewed and set aside those orders of disbarment and contempt in a series of related proceedings brought to that court by various parties involved in the Oklahoma orders and which proceedings were ultimately consolidated in the United States Court

of Appeals and disposed of by the opinion by Judge Doyle of that court. That opinion and the orders therein are sought to be reviewed by the petition for writ of certiorari. The three proceedings in the United States Court of Appeals for the Tenth Circuit which were consolidated for final disposition consisted of a petition for writ of mandamus, an appeal from the judgment of disbarment and an appeal from the order of contempt.

Questions presented for review in this matter are those of the right, power and propriety of petitioner as a United States District Judge to order disbarment of attorneys appearing before him and holding them in contempt under the facts and circumstances arising in this case. A further question involves the validity, constitutionality and applicability of a local rule of the United States District Court for the Western District of Oklahoma. A further question presented for review is the right of judicial discretion of a United States District Judge in the maintenance of dignity of the court by entering orders of disbarment and contempt for acts committed before him.

RULE OF COURT INVOLVED

Local Rule 4(j)(1) of the rules of the United States District Court for the Western District of Oklahoma promulgated by that court and effective March 15, 1973 is involved in this proceeding. A copy of said rule appears in Appendix B.

STATEMENT OF THE CASE

Jurisdiction of the United States District Court

The jurisdiction of the United States District Court for the Western District of Oklahoma in the first in-

stance arose in a petition filed before that court by Governor David Hall and his wife to perpetuate testimony of one Dorothy Pike who had previously been Governor Hall's secretary. That proceeding was commenced under Rule 27 of the Federal Rules of Civil Procedure. The proceeding to perpetuate testimony in turn related to matters cognizable in a court of the United States in that Governor Hall was under investigation by the Internal Revenue Service and Department of Justice for both civil and criminal federal income tax liabilities. The second proceeding initially brought in the United States District Court for the Western District of Oklahoma also by Governor Hall and his wife was a petition seeking to enjoin the Justice Department and Internal Revenue Service from interfering with attempts by Governor Hall to communicate with the witness, Dorothy Pike. This proceeding also invoked the jurisdiction of the United States District Court under Rule 65 of the Federal Rules of Civil Procedure seeking an order restraining and enjoining certain federal agencies from allegedly secreting a witness key to the investigation of the income tax problems of Governor Hall and his wife.

Summary of Proceedings in United States District Court

Two proceedings were commenced in the United States District Court by Governor Hall and his wife. One designated 74-29-C in that court was a petition to perpetuate the testimony of Dorothy Pike, former secretary to Governor Hall and the other proceeding, 74-30-C in that court, sought to enjoin alleged interference by the Justice Department or Internal Revenue Service of efforts of Governor Hall to communicate with and interview Dorothy Pike who

was a key witness in the admitted investigation of the Justice Department and the Internal Revenue Service into Governor Hall's income tax liabilities. In that proceeding Governor Hall alleged invasion of his civil rights. The proceedings in the United States District Court are summarized in the opinion of Judge Doyle of the United States Court of Appeals for the Tenth Circuit which opinion appears in Appendix A. Incorporated as a part of that opinion is the judgment of disbarment dated March 11, 1974 entered by petitioner. Appendix C contains the contempt order.

Essentially, the two proceedings initiated in the United States District Court before petitioner were those of Governor Hall and his wife as private citizens seeking access to the Governor's former secretary who Governor Hall felt was being hidden out by agents of the federal government to prevent communication by him or his counsel. A number of hearings were held before petitioner involving the United States Attorney for the Western District of Oklahoma, members of his staff and regional counsel of Internal Revenue Service who was assisting the United States Attorney before petitioner in these proceedings. Petitioner urged assistance and cooperation of government counsel in giving the court full information about the whereabouts of the witness, Dorothy Pike. Petitioner in these several hearings made repeated efforts to resolve the controversy about the availability of the witness Dorothy Pike and his rulings were designed to make the witness available for testimony under oath. On March 11, 1974, petitioner entered both a judgment of disbarment of the government counsel involved and an order requiring the same government counsel to show cause why they should not be punished for contempt for their

conduct in not complying with the court's orders regarding the witness, Dorothy Pike. The orders of disbarment and contempt were based upon the same conduct of government counsel in not carrying out the mandate of petitioner to bring about the final result which it was apparent petitioner was requiring—namely, production of the witness, Dorothy Pike, for examination under oath by Governor Hall.

Petitioner invoked the local rule of his district in meting out discipline to government counsel appearing before him and that rule is held by the decision of the United States Court of Appeals for the Tenth Circuit to be unconstitutional in its use by Judge Chandler.

The primary thrust of the appellate proceedings commenced in the United States Court of Appeals for the Tenth Circuit and consolidated by that court, was the two-fold contention by government counsel that the orders of Judge Chandler violated due process and were not supported by the evidence. Petitioner's position is simply that as a trial judge it is his duty to maintain the dignity of his court and the conduct of government counsel justified his actions; that his discretion as a trial judge should not be second guessed by an appellate court; that he acted under the provisions of a local rule of his court; and, finally, that there was no violation of the constitutional right of due process in his disciplinary orders.

In the proceedings before petitioner, Judge Chandler, it soon became evident that the United States Attorney for the Western District of Oklahoma was refusing to divulge the whereabouts of the witness, Dorothy Pike, when he had the means readily available to him to ascertain her whereabouts and that this was

true when he was first asked to do so on January 17, 1974 at the initial proceeding before petitioner. Petitioner has asked the clerk of the United States Court of Appeals for the Tenth Circuit to certify the record to this Court. The transcript of the proceedings which took place before petitioner, discloses petitioner's obvious concern that government counsel were not leveling with him regarding the whereabouts of the witness, Dorothy Pike, when it was most evident that petitioner had determined that this witness must be made available and that he had determined his jurisdiction to issue process and order her to testify. The first hearing was January 17, 1974 and petitioner advised of his conclusion that the witness should be made available. At the hearing on January 21, 1974 petitioner not only directed the issuance of a subpoena to require the witness to appear, he gave notice to government counsel that any attempt to prevent her appearance in his court would be "unethical" and would "constitute obstructing and impeding justice" and could subject the person preventing Mrs. Pike's appearance to be in contempt of his court. An attempt by government counsel to have the order issuing the subpoena stayed by the United States Court of Appeals for the Tenth Circuit was refused in that court. On January 22, 1974, Judge Chandler again made his views known that any party or counsel who had information as to the whereabouts of Mrs. Pike was to furnish that information at once. On January 28, 1974, Judge Chandler entered a written order ordering the parties to assist in the search for the witness. The United States Court of Appeals concluded in its opinion that "Mr. Burkett was unenthusiastic in his response to the suggestions and exhortations of Judge Chandler to cooperate" but went on to

find that there was insufficient evidence to support the holding of contempt and order of disbarment.

An important fact in the chronology of events before Judge Chandler and a fact vital to determination of the questions presented to this Court on the constitutionality of a local rule of court and the right of the trial judge to discipline attorneys, is the fact that in the judgment of disbarment government counsel were invited to file before Judge Chandler a petition for review of the judgment of disbarment. In the order for contempt government counsel were ordered to appear before the court and show cause why they should not be found in contempt. This procedure not only followed the local rule of court, but was consistent with due process and gave notice to government counsel who were being punished and gave them full allowance for protection of their right to be heard further before Judge Chandler. Government counsel refused the offered right for review and went direct to the United States Court of Appeals for relief contending that their rights were violated and they had not had their day in court on the disciplinary orders issued against them.

REASONS FOR THE PETITION

First and foremost, this proceeding involves the critical problem of maintaining the dignity of the trial court and the right and discretion of a trial judge to order discipline of attorneys appearing before him because of their conduct in dealing with the court and in not complying with the directives and requirements of the court. This case involves a need for defining the right and discretion of a trial judge for guidance for trial courts, both state and federal, in maintaining the dignity of their courts at a time when

the preservation of that dignity and maintenance of discipline therein is under pressure and attack throughout the land. No more important problem exists in the administration of justice. This case raises the question of propriety of procedures for both disbarment and holding of counsel in contempt by a United States District Judge and whether or not the procedures invoked by Judge Chandler violated the constitutional right of due process of government counsel appearing before him. This case involves whether or not disciplined counsel can by-pass review procedures at the trial court level and go to the Court of Appeals.

This Court speaking through Chief Justice Burger in a case also involving petitioner, in the case of *Chandler* v. *Judicial Council,* 398 U.S. 74, 26 L.Ed. 2d 100, 90 S.Ct. 1648, in which the actions of the Judicial Council of the Tenth Circuit regarding the assignment of cases to Judge Chandler were upheld stated:

> "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."

This Court went on to say that the housekeeping problem of assignment of cases and the dividing of court business was properly a subject for action by the Judicial Council. In the case at bar, however, we submit that Judge Chandler's invoking of his local disciplinary rule was done by him as the judge in charge of his own court and the conduct of all proceedings before him was done in carrying out the "decisional function."

United States District Courts have adopted local rules of proceedings before those courts which embrace

such things as disciplinary procedings. These rules are commonplace in districts of the federal judicial system. The Western District of Oklahoma effective March 15, 1973 adopted some thirty-two rules, one of which is Rule 4 involving attorneys and embraces all aspects of eligibility, admissability, requirement of resident counsel and discipline. Subdivision j of Rule 4 of the local rules of the Western District of Oklahoma is set forth in Appendix B. Judge Chandler proceeded under subdivision 1 of said rule entitled "summary discipline." The decision of the United States Court of Appeals for the Tenth Circuit rejected the contention of Judge Chandler that pursuant to the local rule he gave the disbarred attorneys a chance for a hearing and review before him. The Tenth Circuit stated in its opinion as follows:

> "We have considered fully the contention of Judge Chandler that in adjudging the disbarments he acted consistently with Local Rule 4(j)(1) which gave petitioners-appellants a remedy to seek a review of the disbarment judgments. To the extent that the Rule allows entry of a final judgment of disbarment without a hearing, it conflicts with the Supreme Court and other federal court decisions. On that account, we have had to reject this argument advanced by respondent. The finality of the adjudications here is unquestionable. It is equally clear that there were no hearings."

We submit that as further reason for review by this Court of the decision of the United States Court of Appeals, the application and constitutionality under the due process clause of this local rule of the Western District of Oklahoma on discipline of attorneys should be scrutinized by this Court. It will be of importance

and guidance to United States District Courts throughout the entire federal judiciary to have a pronouncement of this Court as to constitutionality and applicability of rules of discipline and the extent to which summary discipline is proper for conduct committed in the presence of the court. If certiorari is granted in this case, it is our intention to make a survey of disciplinary rules of other United States District Court to compare other local rules to that of the Western District of Oklahoma.

We further submit that the decisions of this Court cited by Judge Doyle in his opinion for the Tenth Circuit (Appendix A) in the case of *Ex parte Robinson,* 86 U.S. (19 Wall.) 505 (1874), and the case of *In re Ruffalo,* 390 U.S. 544 (1968), calling for an opportunity of a disbarred attorney to have opportunity for explanation and defense do not call for reversal of Judge Chandler's orders. Judge Chandler in his order of disbarment specifically invited filing of a petition for the order to be reviewed and for showing of cause to set it aside, which invitation was declined by the disbarred attorneys in this case. Thus the disbarment order was not a "final one" and the statement in the opinion that "the finality of the adjudication here is unquestionable" constitutes a misapprehension of the disbarment order of Judge Chandler and calls for review by this Court by the granting of certiorari.

Petitioner does not contend that government counsel should have no opportunity to defend against his action of disbarment under due process, but contends that in the very order of disbarment a time was set for filing of a petition for relief and review of his

order, indicating that the order was not a final one. Petitioner feels an opportunity under the local rule of his court was being given to these attorneys for answering the court's determination that they should be disbarred. The very fact that this controversy arose as to the application of local Rule 4 of the Western District of Oklahoma and whether or not its application by Judge Chandler in this case constitutes a violation of due process itself displays the need for pronouncement by this Court in the important area of matters of discipline by a trial judge.

A final basis for a need for review by this Court of the decision of the Tenth Circuit is the finding of that court that the remedy of mandamus was available when that court determined that the contempt order was not a final order and therefore not an appealable order. The opinion cites decisions of this Court to the effect that a writ of mandamus is not to be used as a substitute for an appeal. Nevertheless, the court goes on to find that the circumstances in this case were "exceptional and justifying entertaining the mandamus." The order of contempt was a show-cause order and contained an order that government counsel involved should show cause in writing why they should not be punished for contempt. The attorneys involved have never attempted to make a showing of cause and no punishment for contempt has been meted out by Judge Chandler. Nevertheless, the Court of Appeals utilized the extraordinary remedy of mandamus and entertained the writ of mandamus thus allowing the attorneys involved to by-pass the trial court. We sub-

mit that the need for clarification as to use of the remedy of mandamus is called for in this case.

Respectfully submitted,

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May 1975

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 74-1120, 74-1297 and 74-1298

WILLIAM B. BURKETT, ET AL., *Appellants, Petitioners,*

v.

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, *Respondent.*

DAVID HALL and JO EVANS HALL,
Plaintiffs-Appellees,

v.

WILLIAM R. BURKETT, United States Attorney for the Western District of Oklahoma, and CLYDE L. BICKERSTAFF, Oklahoma District Director, Internal Revenue Service, *Defendants-Appellants.*

Argued Sept. 12, 1974

Decided Nov. 7, 1974

• • •

Neil H. Koslowe, Atty., Dept. of Justice (Carla A. Hills, Asst. Atty. Gen., and Leonard Schaitman, Atty., Dept. of Justice, on the brief), for petitioners-appellants and defendants-appellants.

Walter A. Steele, Denver, Colo., for respondent and appellee, Stephen S. Chandler.

Before BREITENSTEIN, BARRETT and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

This is an appeal together with extraordinary writs which seek to set aside judgments disbarring from the

practice of law and citing for contempt the United States Attorney for the Western District of Oklahoma and several of his assistants. The cases in this court arise out of a Western District of Oklahoma proceeding, No. 74-30-C, in which David Hall, Governor of Oklahoma, and his wife, Jo Evans Hall, were plaintiffs. It sought injunctions against the United States Attorney and other federal officers.

The underlying controversy giving rise to all of this litigation arose from an investigation by the Justice Department and the Director of Internal Revenue of possible income tax evasion by Governor Hall. Dorothy Pike was an important witness in behalf of the government. Allegedly, under the auspices of the Internal Revenue Service, she was secreted in Arlington, Virginia. Her whereabouts was not known to either the Halls or to Judge Chandler. Her specific whereabouts was at first unknown to Mr. Burkett, but Judge Chandler believed that the information was accessible to Mr. Burkett and that he was not cooperating. Thus, the bone of contention was where she was, whether she was subject to having her deposition taken and whether the United States Attorney could and would produce her.

No. 74-30-C has generated several consolidated matters which are presently before us. Number 74-1120 is a petition for writ of mandamus; Number 74-1297 is an appeal from the judgments of disbarment; and Number 74-1298 is an appeal from an order to show cause for contempt.[1]

The Proceedings in District Court

Number 74-29-C was a petition to perpetuate the testimony of one Dorothy Pike who had been Governor Hall's

[1] In this court Judge Chandler is represented by an outstanding member of the Colorado Bar, Walter A. Steele. We appointed Mr. Steele, and his representation of Judge Chandler has been and is excellent.

secretary. Number 74-30-C essentially sought to enjoin interference with the efforts of Hall to communicate with Dorothy Pike. The definitive allegation was invasion of the Halls' civil rights.

Number 74-30-C, the injunction action, was assigned to Judge Chandler who appears as an appellee-respondent. The main effort of the several hearings was to locate and bring the witness Dorothy Pike before the court for the giving of testimony.

On January 30, 1974, an application was made by the United States Attorney and the Director of Internal Revenue Service for writ of prohibition and mandamus. This court ordered that a writ issue directing the respondent to show cause within 10 days why the writ should not be made permanent and that pending final disposition of the petition further proceedings in the district court were to be stayed.

On March 11, 1974, Judge Chandler issued the judgments of disbarment against the United States Attorney and his assistants, the other individual appellants (in Misc. No. 7). That judgment charged that appellants had wilfully and corruptly aided and abetted and conspired with Burkett to conceal the whereabouts of Dorothy Pike from the court and from the United States Marshal; that Burkett had committed perjury at one of the hearings; and that the other appellants had known of this and had failed to reveal it to the court and were, on this account, guilty of misprision of a felony. A further charge in the disbarment judgment was that the appellants had conspired to violate the civil rights of Governor Hall and his wife and had concealed from the court an application for writ of prohibition and mandamus (the one filed in this court on January 30, 1974).

Also, on March 11, 1974, Judge Chandler issued an order directed to the appellants to show cause why they should

not be punished for civil and criminal contempt for having obstructed justice by concealing the whereabouts of Mrs. Pike, for having committed perjury and for having been guilty of misprision of a felony.

On March 12, 1974, an application for writs of prohibition and mandamus were filed in this court challenging the disbarment and contempt orders. On that same day this court issued its order staying the order of disbarment until further order. On March 21, 1974, a clarifying order was issued providing that the stay of March 12 applied also to the citation for contempt.

The issue presented to us is whether the actions of the district court disbarring the appellants and charging them with contempt were valid. Appellants-petitioners seek to set aside the orders saying they are invalid and unconstitutional. The text of the judgment of disbarment is set forth in an appendix to this opinion.

Prior Proceedings in This Court

On February 1, 1974, in No. 74-1013, a temporary order was entered by this court staying the taking of the deposition of Dorothy Pike at the time and on the date specified in the court order until further order of this court. This pertained to Cause No. 74-30-C in the district court. At the same time, an order was entered directing the respondent to show cause why the writ should not be made permanent. Subsequently, a response was filed in accordance with the said order. The respondent also sought to clarify its position by a letter which explained that the district court had not exercised unlimited jurisdiction in the premises, but had merely undertaken to hear the application for a temporary injunction together with the defendants' motion to dismiss.

On June 7, 1974, following oral arguments, we issued a per curiam order in Cause No. 74-30-C. A copy of this order

is appended hereto. It recites that the above numbered district court action sought to enjoin the United States Attorney, the Director of Internal Revenue and others from conducting an investigation of the Honorable David Hall, Governor of Oklahoma, and that an effort had been made in these proceedings to take the deposition of Dorothy Pike, former secretary to Governor Hall. The essential holding was that the district court lacked jurisdiction to entertain this action since it sought to enjoin public officials from carrying out their duties; that it was in effect then a suit against the United States. The writ of prohibition was issued. The perpetuation action, No. 74-29-C, was not included in the writ.

The Evidence Before Judge Chandler Antecedent to the Issuance of the Disbarment and Contempt Orders

On January 17, 1974, Mr. Burkett in testimony before Judge Chandler denied that the defendants in No. 74-30-C were interfering with the plaintiffs' efforts to see Mrs. Pike.[2] According to Burkett, the government's access to Dorothy Pike was through the latter's sister in Missouri.

Although Judge Chandler did not order the United States Attorney's office to produce her, he made "suggestions" several times that the government agents cooperate in producing her or in obtaining the information as to her whereabouts so that the plaintiffs could proceed. The United States Attorney's position was that he would not *voluntarily* assist in locating her.

On January 18 there was another hearing, and here again Judge Chandler repeatedly urged the parties to cooperate in getting the testimony of Dorothy Pike. The Judge or-

[2] Mr. Burkett had also filed on that same day a motion to dismiss to which was appended a handwritten affidavit of Dorothy Pike stating that she had requested and received protection from the Internal Revenue Service because of fear for her personal safety and stating that she was free to come and go as she wished.

dered that a subpoena issue for her deposition. He suggested that counsel call her up and ask her to appear. Burkett stated his position as being that the government objected to subpoenaing Mrs. Pike to testify in the proceeding and before the court. The court continued to reiterate its hope that counsel would simplify the matter or cooperate in requesting Mrs. Pike to come into court. The telephone call suggested by the Judge was not completed.

On January 21 another hearing was held. At that time Judge Chandler suggested that an attempt to prevent production of the witness was either unethical or in violation of the law.[3]

As a next step, Judge Chandler issued a new subpoena and requested the cooperation of all agencies in locating her.[4] Mr. Burkett reminded the court that he objected to the proceedings. His request for a stay was, however, denied.

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[3] On this the Judge said:

> Of course I realized that you gentlemen, here, would know that it would be, to say the least, unethical and also, being lawyers, would realize that to attempt to keep her from appearing would be a violation of the criminal laws of the United States, Section 1503, and Section 2 of Title 18, which provides that it would constitute obstructing and impeding justice, and would be a felony, which would apply not only to anyone doing the obstructing or the impeding but to anyone aiding or abetting, and who would be the same as a principal and that would constitute a felony.

[4] He later said:

> I would think that the defendants in the action would furnish me with whatever facilities they have to expedite it and assist. I don't want her arrested and brought in here. . . . I believe that as soon as she's informed by anybody that this Court has process out for her . . . and that all of the defendants and the plaintiffs and the Court want her to be either deposed somewhere or to come here . . . that she will come in.

The following day Judge Chandler announced that the subpoena that he had ordered previously had not issued and he produced a new subpoena, handed it to the Marshal and directed him to serve it. Judge Chandler at the same time declared that anyone knowing the whereabouts of Mrs. Pike had the legal and ethical duty to advise the Marshal. On January 28, 1974, the Judge *ordered* the parties to assist in the search for Mrs. Pike. On that same day Mr. Burkett sent a memorandum to Mr. Bickerstaff, the Oklahoma Internal Revenue Director, stating that the Internal Revenue Service employees should be questioned as to her whereabouts and that he (Burkett) should be advised in writing as to the results of the inquiry. Soon thereafter, Mrs. Pike was found in Arlington, Virginia and the information was given to the Marshal. She was served a subpoena in Arlington at 4:00 p.m. on January 29. Meanwhile, Mr. Burkett sought relief by extraordinary writ in this court. A copy of this letter petition was given to Judge Chandler.

A stay was issued by this court and we ordered respondent to show cause why the writ should not be made permanent. Judge Chandler was concerned that he had not been notified of the filing of the petition and that this court had not been notified by Burkett of Judge Chandler's desire to be heard. Mr. Burkett stated that there had not been a hearing and he had not made any oral presentation.

The judgments of disbarment against the United States Attorney and his assistants followed on March 11, 1974. Subsequently, the order of this court in No. 74-1013 holding that the district court lacked jurisdiction to proceed and making permanent the preliminary writ was entered. This, as has been previously explained, pertained to the deposition proceedings of Dorothy Pike.

I.

The Disbarment Proceedings

It is apparent from the foregoing that a legal tug-of-war was taking place between Judge Chandler and the United States Attorney. It seems plain that the whereabouts of Dorothy Pike was ascertainable because once the Judge ordered something more than cooperation her whereabouts of Dorothy Pike was ascer- The question then is whether the failure of Mr. Burkett to cooperate fully justified the imposition of the sanctions—disbarment and contempt.

Defendants contend that the disbarment proceedings were void because there was neither a formal complaint, prior notice given, nor a hearing nor opportunity to be heard. Secondly, they contend that the evidence in the record is insufficient to support the judgment.

We first consider the contention that the *procedure* was invalid. The early decision of the Supreme Court in Ex parte Robinson, 86 U.S. (19 Wall.) 505, 22 L.Ed. 205 (1874), laid down the requirement that a judgment of disbarment cannot be entered without giving the attorney notice of the grounds of complaint and an opportunity to explain and defend. The Supreme Court there said:

> Before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. . . . There may be cases, undoubtedly, of such gross and outrageous conduct in open court on the part of the attorney as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. . . . The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights.

86 U.S. at 512-513.

The decisions of this court cited by Judge Chandler in his brief, In re Carroll, 416 F.2d 585 (10th Cir. 1969), cert. denied, 396 U.S. 1011, 90 S.Ct. 570, 24 L.Ed.2d 503 (1970) and Howard v. United States District Court, Dist. of Colorado, 318 F.2d 521 (10th Cir. 1963), are cases in which the attorney had a full hearing prior to the taking of disciplinary action. *Cf.* In re Ryder, 263 F. Supp. 360 (E.D.Va.), aff'd, 381 F.2d 713 (4th Cir. 1967). In the *Ryder* case the attorney had been guilty of an effort to conceal evidence which would have convicted his client of robbery. The facts in *Ryder* came out in a hearing in the main case. To prevent the continuation of the attorney in the case, the suspension order was issued. *Ryder* thus has nothing in common with the case at bar.

The *Carroll* and *Howard* decisions recognize the necessity for notice and hearing as prerequisites to the validity of disbarment proceedings. So also the more recent decision in the Supreme Court in In re Ruffalo, 390 U.S. 544, 88 S.Ct 1222, 20 L.Ed.2d 117 (1968) demands that there be notice of the alleged professional misconduct as does Committee on Professional Ethics & Griev. v. Johnson, 447 F.2d (3rd Cir. 1971). We must conclude that the disbarment judgments were procedurally deficient and on that account were invalid.[5]

We need not and do not consider the question whether the court's jurisdiction over the case empowered it to

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[5] We have considered fully the contention of Judge Chandler that in adjudging the disbarments he acted consistently with Local Rule 4(j)(1) which gave petitioners-appellants a remedy to seek a review of the disbarment judgments. To the extent that the Rule allows entry of a final judgment of disbarment without a hearing, it conflicts with the Supreme Court and other federal court decisions. On that account, we have had to reject this argument advanced by respondent. The finality of the adjudications here is unquestionable. It is equally clear that there were no hearings.

disbar the appellants or to hold them in contempt for failure to comply with court orders or requests. We do not have to reach it because the facts fail to establish that Mr. Burkett's conduct constituted the transgressions which the court found and the facts do not call for the sanctions which were imposed, and we now proceed to consider that.

We are mindful that the proceedings giving rise to the suit No. 74-30-C were adversary in the extreme. On the one hand, Governor and Mrs. Hall were seeking to utilize the process of the federal court to forestall or overcome an impending income tax investigation. On the other hand, the United States Attorney zealously sought to block these efforts. Judge Chandler was undoubtedly sincere in believing that an injustice was threatened but the action that he took was excessive and unwarranted.[6] We note that there is far less basis for subjecting the *Assistant* United States Attorneys to the contempt and disbarment sanctions than exists as to Mr. Burkett, so if the proceedings as to appellant Burkett fail those against the others follow.

First, Judge Chandler found that the attorney had wilfully and corruptly conspired to conceal the whereabouts of Dorothy from the Marshal after the court had admonished them to ascertain and disclose her address and had ordered that a subpoena be served upon her.

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[6] We have put to one side the question whether the lack of jurisdiction in the main lawsuit itself precluded the disbarment and contempt proceedings. *See* Hyde Construction Co. v. Koehring Co., 348 F.2d 643, 647 (10th Cir. 1965), rev'd on other grounds, 382 U.S. 362, 86 S. Ct. 522, 15 L.Ed.2d 416 (1966). In that case our court recognized that in a criminal contempt proceeding (which this purports to be) the court has the power to punish the actions constituting an affront to its dignity regardless of whether the order which was disobeyed was valid or not. Civil contempt was distinguished as being dependent on the validity of the order since it accrues to the benefit of the opposing party.

At this point Judge Chandler had sought *cooperation* and the United States Attorney maintained that the court lacked jurisdiction to entertain the suit, a conclusion which was later borne out by our decision of June 10, 1974. The record fails to establish that an order was given or that the attorneys either concealed or conspired to conceal the whereabouts of Mrs. Pike from the Marshal following the exhortations or solicitations of the court.

On January 28 Judge Chandler *ordered* the appellants to assist in locating Mrs. Pike. This was obeyed. Immediately after this order, they did indeed aid in locating her.

We have to conclude that prior to January 28 the "orders" of Judge Chandler were not orders at all to assist in location of the witness. They were no more than requests for cooperative effort. These are not necessary predicates for disbarment or contempt.

Second, Judge Chandler found that the assistants wilfully and corruptly aided and abetted Burkett in concealing the whereabouts of Dorothy Pike. It follows from our analysis and conclusion as to the insufficiency of the evidence against Burkett that the insufficiency is even more marked as to the Assistant United States Attorneys.

Third, Judge Chandler found that Burkett committed perjury in testifying that neither he nor the Internal Revenue Service knew the whereabouts of Mrs. Pike. Burkett made clear in this testimony that he did not know the whereabouts of Dorothy Pike but he acknowledged that the Internal Revenue Service had a contact with her through her sister who lived in Southwest City, Missouri. From everything that appears in the record, this statement is true. There may have been non-cooperation, but no evidence that Burkett committed perjury.

Fourth, Judge Chandler found that the assistants knew of Mr. Burkett's failure and were accessories after the

fact. This must be also rejected. It is tenuous and frivolous.

Fifth, Judge Chandler found that the accused attorneys conspired to injure Governor and Mrs. Hall's exercise of enjoyment of free rights.

The only evidence offered by the Halls in support of this civil rights contention was the testimony of Mr. Burkett, a newspaper article and a letter from Burkett to a state attorney requesting the state attorney to quash a subpoena for Mrs. Pike. The most that can be said of this is that Burkett and his assistants moved to thwart the effort of the Halls to use the civil process of the United States court to advance their interest in avoiding an indictment. In performing these official functions, Burkett and his aides were not guilty of violating the Hall's civil rights.

Sixth, Judge Chandler found that the appellants conspired to conceal from the court that an application for a writ of prohibition was to be filed and presented to this court on January 30, 1974, after the court had ordered that he and Governor and Mrs. Hall be notified of any such application. Admittedly, this was a request and not an order, and in any event Judge Chandler notified the court that he intended to represent himself. There is not any semblance of prejudice which resulted from the failure of Burkett to notify the judge of this fact, and in any event Mr. Burkett was never given access to and had no opportunity to communicate with the judges of this court.

II. The Contempt Citations

We next consider Judge Chandler's order of March 11, 1974, ordering the appellants-petitioners to show cause in writing why they should not be punished for both civil and criminal contempt. In passing, we note that this is not a final order within the meaning of 28 U.S.C. § 1291. Since there has not been a final adjudication of contempt

or a sentence, the appeal remedy is not available. *See* 9 J. Moore, Moore's Federal Practice § 110.13 [4] (1970). *See also,* Fox v. Capital Co., 299 U.S. 105, 57 S.Ct. 57, 81 L.Ed. 67 (1936); SEC v. Naftalin, 460 F.2d 471 (8th Cir. 1972); Hyde Construction Co. v. Koehring Co., 348 F.2d 643, 647 (10th Cir. 1965), rev'd on other grounds, 382 U.S. 362 (1966). *Cf.* Massengale v. United States, 278 F.2d 344 (6th Cir. 1960) re necessity for punishment.

However, the matter is before us on the writ of mandamus, No. 74-1120, as well as appeal. We recognize that this writ is not to be used as a substitute for an appeal. *See* Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947); In re Chicago, R. I. & Pacific Ry., 255 U.S. 273, 275-276, 41 S.Ct. 288, 65 L.Ed. 631 (1921); In re Tiffany, 252 U.S. 32, 40 S.Ct. 239, 64 L.Ed. 443 (1920); Erie Bank v. United States Dist. Court for Dist. of Colo., 362 F.2d 539, 540 (10th Cir. 1966). We consider circumstances here to be exceptional and justifying entertaining the mandamus. *See* Will v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967).

The order to show cause stems from the identical conduct that Judge Chandler relied on in the disbarment proceedings, and there is no necessity for repeating the evaluations already given. We merely say that the dearth of evidence in support of the adjudications is so plain that the accused attorneys are not to be subjected to meaningless procedure in connection with these contempt citations. It would be time consuming, expensive and would hinder performance of official duties. In addition, further proceedings would continue the turmoil. It is our opinion in view of this that the mandamus is an appropriate remedy here.

In United States v. Hemphill, 369 F.2d 539 (4th Cir. 1966) the federal district judge had ordered the Secretary of Labor to answer interrogatories in an enforcement proceeding under the Fair Labor Standards Act. The Court of Appeals there held that compelling the Secretary of La-

bor to respond would impose great hardship and little countervailing value, and that it was proper for the Court of Appeals to issue the writ. The same is true here.

We repeat that we have not condoned refusal to obey an incorrectly entered order. *Cf.* Hyde Construction Co. v. Koehring Co., *supra*. We will meet this issue if and when there exists a need to do so.

Viewing the record as a whole, we conclude that while Mr. Burkett was unenthusiastic in his responses to the suggestions and exhortations of Judge Chandler to cooperate, we find no evidence establishing contemptuous refusal to obey specific orders and find no evidence that Burkett misled the court or failed in any obligations to serve the court. The lack of responsiveness to suggestions does not suffice.

Accordingly, then, since there is a dearth of evidence to support the allegations of the order to show cause, the writ must issue.[7]

It is the order of this court that No. 74-1297 be reversed and remanded with directions to appellee, Judge Chandler, to vacate and set aside the disbarment judgments against the several appellants. It is the further order of the court that the writ of mandamus presented to us in No. 74-1120 be made final and absolute and that the order or orders to show cause why petitioners should not be held in contempt be vacated, set aside and held for naught.

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[7] See Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957).

APPENDIX A

MAY TERM—May 28, 1974

Before Honorable Delmas C. Hill, Honorable Robert H. McWilliams and Honorable William E. Doyle, Circuit Judges.

No. 74-1013
June 7, 1974

WILLIAM R. BURKETT, etc., et al., Petitioners,

v.

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, Respondent.

PER CURIAM ORDER

Petitioners seek writs of prohibition and mandamus against the Honorable Stephen S. Chandler. The thrust of the District Court proceedings in cause No. 74-30-C against which extraordinary writs are sought is to enjoin the United States Attorney, the Director of Internal Revenue and their agents and servants from proceeding to conduct an investigation against the Honorable David Hall, Governor of Oklahoma. In connection with these proceedings in the District Court, an effort has been made to take the deposition of Dorothy Pike, former secretary to Governor Hall, the basis being that the testimony is essential to the defense of Governor Hall in the mentioned investigative proceedings.

An order to show cause has issued, oral arguments have been presented, briefs have been filed and it is now concluded that the action of the District Court has been and is now without jurisdiction in that suit would seek to enjoin the defendants, petitioners here, from pursuing official duties. Thus, it is outside the jurisdiction of the District

Court. *See* Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947).

In Dugan v. Rank, *supra,* property owners sought to enjoin officials of the Bureau of Reclamation from impounding water behind a federal dam. The Supreme Court decided that such action against officials who were acting within the scope of their statutory authority was in effect a suit against the United States without its consent.[1]

Larson v. Domestic & Foreign Corp., *supra,* involved an action to enjoin the War Assets Administrator from selling surplus coal to any person other than the plaintiff. The Supreme Court dismissed the case on the grounds that it attempted to restrain a public official from performing his statutory function. However, the Court in *Larson* recognized two exceptions to the doctrine of sovereign immunity. These are: (1) actions by officers beyond their statutory powers and (2) although the actions by officers are within the scope of their powers, the powers themselves or the manner in which they are exercised are unconstitutional. Since neither of these exceptions applies to the case at bar, we conclude that the defendants in this action were immune from suit. *See also* Junior Chamber of Commerce of Rochester v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974); National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973).

It follows that the petitions for writ of prohibition and mandamus in cause No. 74-30-C in the district court, the injunction action against the United States Attorney and

[1] The Supreme Court explained that a suit against public officials is considered a suit against the sovereign "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of the judgment would be 'to restrain the Government from acting or to compel it to act.' " 372 U.S. at 620, 83 S.Ct. at 1006.

Director of Internal Revenue, must be granted. The rule to show cause is made absolute, and it is ordered that the cause in the district court should be and the same is hereby dismissed.

The above order does not affect cause No. 74-29-C, the action seeking to perpetuate testimony.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Miscellaneous No. 7

IN RE: WILLIAM R. BURKETT, JEFF R. LAIRD, JAMES M. PETERS, FLOY E. DAWSON, O. B. JOHNSTON III and G. PHIL HARNEY

JUDGMENT OF DISBARMENT

On this 11th day of March, 1974, the Court having considered the matters which have heretofore transpired in the very presence of the Court while sitting in and hearing

> Civil Action Number 74-30 C pending in this Court entitled *David Hall and Jo Evans Hall* v. *William R. Burkett,* United States District Attorney for the Western District of Oklahoma; and *Clyde L. Bickerstaff,* District Director, Internal Revenue Service

and having carefully reviewed the entire record in said action, concludes that it is his duty under the law and the Canons of Judicial Ethics to disbar from the practice of law in the United States District Court for the Western District of Oklahoma,

> WILLIAM R. BURKETT, United States District Attorney for the Western District of Oklahoma;

JEFF R. LAIRD, First Assistant United States District Attorney for the Western District of Oklahoma;

JAMES M. PETERS, FLOY E. DAWSON, and O. B. JOHNSTON III, Assistant United States District Attorneys for the Western District of Oklahoma; and

G. PHIL HARNEY, Senior Attorney, Regional Counsel, Internal Revenue Service.

The Court upon careful consideration finds from the complete record of the evidence the facts to be that the above named members of the Bar, in violation of their oaths as members of the Bar of this Court and in violation of their oaths as Officers of the United States

1. Did wilfully and corruptly conspire with William R. Burkett to conceal the whereabouts of Mrs. Dorothy Pike from the United States Marshal and the Court after the Court had admonished them to ascertain and disclose her address and had ordered a subpoena issued and served upon her which constitutes obstructing and impeding justice in said action.

2. Did wilfully and corruptly aid and abet William R. Burkett in concealing the whereabouts of said Mrs. Dorothy Pike.

3. William R. Burkett did testify under oath that neither he nor the Internal Revenue Service nor their employees and agents knew the whereabouts of Mrs. Pike when in truth and in fact he knew that he could obtain her address and failed to reveal said fact, which constituted perjury.

4. The fact that William R. Burkett had not told the whole truth was known to Jeff R. Laird, James M. Peters, Floy E. Dawson and O. B. Johnston III and G. Phil Harney and they failed to reveal the fact to the Court which constituted the crime of Misprision of Felony.

5. Did conspire to injure David Hall and Jo Evans Hall in the free exercise and enjoyment of their civil rights and

privileges secured to them by the Constitution and laws of the United States in violation of Title 18 U.S.C. 241.

6. The said attorneys did conspire to conceal from the Court that an Application for Writ of Prohibition and Mandamus would be filed and presented to the United States Court of Appeals for the Tenth Circuit on January 30, 1974, in

> Original Action Number 74-1013 entitled *William R. Burkett,* United States Attorney for the Western District of Oklahoma; and *Clyde L. Bickerstaff,* District Director, Internal Revenue Service

after the Court had ordered in

> Civil Action Number 74-30-C pending in this Court entitled *David Hall and Jo Evans Hall* v. *William R. Burkett,* United States District Attorney for the Western District of Oklahoma; and *Clyde L. Bickerstaff,* District Director, Internal Revenue Service

that he and the real parties in interest be notified of any such application so that they could appear and defend and said William R. Burkett did file such an Application and obtain an *ex parte* Writ of Prohibition prohibiting further proceedings in Civil Action Number 74-30.

All in violation of the Professional Code of Ethics and Title 18 U.S.C. § 2, § 1503, § 241, § 371, § 401, § 402, § 1621, § 1622, § 1623.

THEREFORE, pursuant to Rule 4(j)(1) of the Rules of the United States District Court for the Western District of Oklahoma, adopted January 1, 1971,

IT IS ORDERED AND ADJUDGED that

WILLIAM R. BURKETT
JEFF R. LAIRD
JAMES M. PETERS

FLOY E. DAWSON
O. B. JOHNSTON III and
G. PHIL HARNEY

are hereby DISBARRED and the Clerk of this Court is hereby ORDERED to strike their names from the roll of attorneys admitted to practice before the United States District Court for the Western District of Oklahoma.

In accordance with Rule 4(j)(1) said attorneys are advised that if they care to seek relief from this judgment by written Petition and care to show cause for the relief sought, they are ordered to file such a Petition with supporting brief in the Office of the Clerk of this Court on or before the 21st day of March, 1974.

The United States Marshal is ordered to make personal service of this Judgment upon each of named parties forthwith.

The Clerk of the Court is ORDERED to transmit forthwith a photostatic copy of this Judgment of Disbarment and the entire transcript of the evidence and proceedings in

Civil Action Number 74-30-C pending in this Court entitled *David Hall and Jo Evans Hall* v. *William R. Burkett*, United States District Attorney for the Western District of Oklahoma; and *Clyde L. Bickerstaff*, District Director, Internal Revenue Service

to The Attorney General of the United States of America and to the Oklahoma State Bar.

/s/ STEPHEN S. CHANDLER
United States District Judge

ENTERED IN JUDGMENT DOCKET ON
MARCH 11, 1974

By: Ruth T. Olsen

JANUARY TERM—JANUARY 29, 1975

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

Nos. 74-1120
74-1297
74-1298

(Consolidated Cases)

WILLIAM R. BURKETT, et al.,
Petitioners,

v.

STEPHEN S. CHANDLER,
United States District Judge, etc.,
Respondent.

and

In the Matter of
WILLIAM R. BURKETT, et al.,
Plaintiffs-Appellants,

v.

DAVID HALL, et al.,
Plaintiffs-Appellees,

v.

WILLIAM R. BURKETT, etc., et al.,
Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the Respondent and Appellee in the captioned consolidated cases.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Breitenstein, Barrett, and Doyle to whom the cases were argued and submitted.

The petition for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Judge Holloway did not participate in consideration of the petition for rehearing or the suggestion for rehearing en banc.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips

APPENDIX B

Rules of the United States District Court for the Western District of Oklahoma

Effective March 15, 1973

RULE 4

ATTORNEYS

(j) Discipline. Any member of the Bar of this Court guilty of a violation of the prescribed oath of office, or of a violation of the disciplinary rules set forth in the Code of Professional Responsibility of the American Bar Association, or of any conduct unbecoming a member of the Bar of this Court, shall be subject to reprimand, suspension, disbarment, or such other disciplinary action as the Court deems appropriate.

(1) Summary Discipline. For misconduct in the presence of the Court, an order may be issued forthwith administering such discipline as the Court deems appropriate, including but not limited to disbarment or suspension from practice in this Court, but an attorney so disciplined may seek relief from such order by written petition showing cause for the relief sought.

(2) Conviction; Disbarment in Other Courts. Any member of the Bar of this Court convicted either in state or federal court of a felony or other crime involving moral turpitude, and any member disbarred or suspended from practice in any court of competent jurisdiction, shall be suspended automatically from practice in this Court and may be reinstated only on written application showing cause why he should be reinstated. For the purposes of this sub-section, conviction occurs upon the entry of a plea of guilty or of nolo contendere or the entry of a judgment of guilt in a trial court of competent jurisdiction, notwithstanding any right of appeal.

(3) Disciplinary Procedure. Proceedings to discipline a member of the Bar of this Court, except as set forth in paragraphs (1) and (2) hereof, shall be upon an order to show cause issued by the Court, reciting the charges and fixing notice and such hearing procedure as may be reasonable and consistent with due process. The Court may, in its discretion, refer any Bar disciplinary matter to the Committee on Admissions and Grievances for proper investigation and recommendation to the Court, either before or after issuance of an order to show cause. Any attorney disbarred or suspended pursuant to these Rules may apply to the Court for leave to petition for reinstatement.

APPENDIX C

Filed March 11, 1974. Rex B. Hawks, Clerk, U.S. District Court.
by /s/ RUTH T. OLSEN, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. Civ.—74-30-C

DAVID HALL and JO EVANS HALL,
Plaintiffs,

v.

WILLIAM R. BURKETT, United States District Attorney for the Western District of Oklahoma; and
CLYDE L. BICKERSTAFF, Oklahoma District Director, Internal Revenue Service,
Defendants.

Order to Show Cause

WILLIAM R. BURKETT
JEFF R. LAIRD
JAMES M. PETERS
FLOY E. DAWSON
O. B. JOHNSTON III
G. PHIL HARNEY

are hereby ORDERED to show cause in writing on or before March 21, 1974, why they should not be punished for Civil and Criminal Contempt of the United States District Court for the Western District of Oklahoma for the following acts performed by them in the presence of the Court while sitting in hearings in the above-entitled action on January 17, 18, 21, 22, 28, 29 and 30 and February 7, 1974:

1. Wilfully and corruptly obstructing and impeding justice by conspiring with William R. Burkett to conceal and by concealing the whereabouts of Mrs. Dorothy Pike from the Court and the United States Marshal from January

18th until January 29th by failing to use the means available to them to ascertain her whereabouts after the Court had requested said attorneys to ascertain from their clients her address and furnish it to the United States Marshal at the earliest possible moment. At the same time the Court advised them that it was their duty to do so and that failure to do so would constitute violation of Title 18 U.S.C. 1503 and that to aid and abet in concealing her whereabouts would under Title 18 U.S.C. 2 make anyone who did so a principal in the act and that they would be guilty of the same felony.

2. William R. Burkett did on January 17. 18, 21, 22, 28, 29, commit perjury by stating and testifying falsely under oath that neither he nor his clients and their agents knew the whereabouts of Mrs. Dorothy Pike, when in truth and in fact he knew that he could ascertain her address from agents of the Internal Revenue Service.

3. Jeff R. Laird, James M. Peters, Floy E. Dawson and O. B. Johnston III and G. Phil Harney on and after January 18 knew of the false statements and perjury committed by said William R. Burkett and knew that they were false and knew of the concealment of the whereabouts of Dorothy Pike by William R. Burkett but wholly failed to so notify the Court which constituted the crimes of Misprison of Felony and obstructing and impeding justice.

The Court finds that all of said acts were committed wilfully and corruptly in the actual presence of the Court sitting in and hearing the above-entitled action as shown by the complete record therein in violation of Title 18 U.S.C. § 2, § 4, § 241, § 371, § 1503, § 1621, § 1622, § 1623, and constitute Civil and Criminal Contempt within the purview of Title 18 U.S.C. 401 by virtue of which the Court is vested with power to punish by fine or imprisonment.

The United States Marshal is ordered to make personal service of this Order to Show Cause upon each of named parties forthwith.

The Clerk of the Court is ORDERED to transmit forthwith a photostatic copy of this Order to Show Cause and the entire transcript of the evidence and proceedings in

> Civil Action Number 74-30-C pending in this Court entitled *David Hall and Jo Evans Hall* v. *William R. Burkett*, United States District Attorney for the Western District of Oklahoma; and *Clyde L. Bickerstaff*, District Director, Internal Revenue Service

to The Attorney General of the United States of America and to the Oklahoma State Bar.

/s/ STEPHEN S. CHANDLER
United States District Judge

Filed March 29 ,1974. Rex B. Hawks, Clerk, U.S. District Court.
by /s/ RUTH T. OLSEN, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Miscellaneous No. 7

IN RE: WILLIAM R. BURKETT
JEFF R. LAIRD
JAMES M. PETERS
FLOY E. DAWSON
O. B. JOHNSTON III and
G. PHIL HARNEY

Order

The Order To Show Cause entered herein on the 11th day of March, 1974, was inadvertently captioned "*David Hall and Jo Evans Hall*, Plaintiffs v. *William R. Burkett*, United States District Attorney for the Western District of Oklahoma, et al, Defendants," Civ-74-30-C. The order

should have been entitled and filed in proceeding Miscellaneous No. 7.

IT IS, THEREFORE, ORDERED that the caption of said Order is amended to read "In Re: William R. Burkett, Jeff R. Laird, James M. Peters, Floy E. Dawson, O. B. Johnston III and G. Phil Harney," Miscellaneous Number 7 in the United States District Court for the Western District of Oklahoma and filed therein.

Said Order To Show Cause is not in any way connected with the issues between the parties in Action Number Civ-74-30-C and the Clerk is hereby ordered to file said Order To Show Cause in this proceeding.

/s/ STEPHEN S. CHANDLER
United States District Judge

No. 74-1510

Supreme Court, U. S.
FILED
JUN 30 1975
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

v.

WILLIAM R. BURKETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1510

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

v.

WILLIAM R. BURKETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner, a federal district court judge, contends that the court of appeals erred in reversing his summary disbarment of a United States Attorney, four Assistant United States Attorneys, and a regional counsel for the Internal Revenue Service, and in issuing a writ of mandamus ordering him to vacate orders to show cause why those government attorneys should not be held in contempt.

This case arises out of events that occurred in the course of litigation brought by David Hall and Jo Evans Hall in the United States District Court for the Western District of Oklahoma. The Halls' complaint listed as de-

fendants William R. Burkett, United States Attorney for the Western District of Oklahoma, Floyd E. Carrier, United States Marshal for the Western District of Oklahoma (who was later dismissed as a party), and Clyde L. Bickerstaff, Oklahoma District Director of the Internal Revenue Service, and it alleged that the Internal Revenue Service was considering commencement of civil and criminal tax fraud proceedings against the Halls and that the Service had certain records that had previously been in the possession of David Hall's former secretary, Dorothy Pike (Pet. App. A, pp. 2a-3a). The Halls requested an injunction barring the defendants from interfering with their efforts to interview Ms. Pike and examine records and documents in her possession (*ibid.*). The Halls' suit was assigned to petitioner Stephen S. Chandler, a United States District Judge for the Western District of Oklahoma (*ibid.*).

During preliminary hearings in that case, the United States Attorney, Mr. Burkett, who was both a party defendant and counsel for the defendants, testified that none of the defendants was interfering with the Halls' efforts to see Ms. Pike, that he did not know Ms. Pike's whereabouts, and that Ms. Pike was receiving protection from the Internal Revenue Service at her request because she feared for her personal safety (Pet. App. A, p. 5a). Petitioner urged the parties, including the defendants, to cooperate in getting Ms. Pike's testimony, and he issued several subpoenas for her deposition (Pet. App. A, pp. 5a-7a). Mr. Burkett objected to the issuance of the subpoenas, contending that petitioner was acting without jurisdiction in the matter (Pet. App. A, pp. 6a, 11a). He advised petitioner that under the circumstances the government would not voluntarily assist in the search for Ms. Pike (Pet. App. A, p. 5a). On January 28, 1974,

petitioner ordered the parties to the suit, including Mr. Burkett, to assist in the search for Ms. Pike (Pet. App. A, p. 7a).

Upon receipt of the order, Mr. Burkett requested the Internal Revenue Service to attempt to locate Ms. Pike; she was located by the Service in Arlington, Virginia, and Mr. Burkett so advised the Marshal, who served her with a subpoena on January 29, 1974 (Pet. App. A, p. 7a). On January 30, 1974, Mr. Burkett filed a petition for a writ of prohibition and mandamus in the United States Court of Appeals for the Tenth Circuit, seeking to prevent Ms. Pike from being compelled to appear in court (Pet. App. A, pp. 7a, 12a). The court of appeals issued a "preemptory writ" to petitioner on the same day, staying all further proceedings in the suit and directing him to show cause why the writ should not be made permanent (Pet. App. A, p. 7a). Subsequently, on June 7, 1974, the court of appeals ruled that petitioner had no jurisdiction to entertain the Halls' suit, and it issued a writ of prohibition and mandamus directing him to dismiss it.[1]

On March 11, 1974, while the petition for a writ of prohibition and mandamus was pending before the court of appeals, petitioner *sua sponte* issued a "Judgment of Disbarment" against the United States Attorney, Mr. Burkett, four of his assistants, and the regional counsel for the Internal Revenue Service.[2] The judgment declared that the attorneys "are hereby DISBARRED and the Clerk of this Court is hereby ORDERED to strike their names from the roll of attorneys admitted to prac-

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[1]The June 7, 1974, order of the court of appeals is set forth at Pet. App. A, pp. 15a-17a, as Appendix A to Pet. App. A.

[2]The judgment of disbarment is set forth at Pet. App. A, pp. 17a-20a, as Appendix B to Pet. App. A.

tice before the United States District Court for the Western District of Oklahoma" (Pet. App. A, p. 20a). The judgment recited as reasons for the disbarment that the government attorneys had "wilfully and corruptly" conspired to conceal the whereabouts of Ms. Pike from petitioner and therefore were guilty of "obstructing and impeding justice"; that Mr. Burkett had committed "perjury" when he denied personal knowledge of Ms. Pike's whereabouts at the initial hearing; that the other government attorneys had known of this "perjury" and had failed to reveal it to petitioner, thereby committing the crime of "Misprision of Felony"; that the named attorneys had conspired to injure the Halls "in the free exercise and enjoyment of their civil rights"; and that they had conspired to conceal from petitioner the filing of the petition for a writ of prohibition and mandamus in the court of appeals on January 30, 1974 (Pet. App. A, pp. 18a-19a). No formal complaint preceded the issuance of the judgment of disbarment, and the attorneys received neither prior notice that disbarment proceedings were being instituted against them nor a prior opportunity to be heard with respect to the specific charges. The judgment did state, however, that the attorneys had ten days in which to petition for reinstatement in accordance with the district court's Local Rule 4(j)(1) (Pet. App. A, p. 20a; see also Pet. App. B, pp. 23a-24a).

Also on March 11, 1974, petitioner ordered the attorneys to show cause within ten days why they should not be held in civil and criminal contempt for having committed the above "crimes" (Pet. App. C, pp. 25a-27a).

On the following day, March 12, 1974, Mr. Burkett, on behalf of all the government attorneys subjected to the judgment of disbarment and the order to show cause, filed a second petition for a writ of prohibition

and mandamus in the court of appeals (Pet. App. A, p. 4a). The court of appeals issued an order the same day staying the disbarments until further order; and on March 21, 1974, it issued an order staying the contempt proceedings until further order (*ibid.*). Mr. Burkett later filed notices of appeals from both the judgment of disbarment and the order to show cause (Pet. App. A, p. 2a).

On November 7, 1974, the court of appeals reversed the judgment of disbarment and issued a writ of prohibition and mandamus directing petitioner to vacate the order to show cause (Pet. App. A, pp. 1a-14a). The court held that the judgment of disbarment was invalid because petitioner had failed to give the government attorneys prior notice and an opportunity to be heard (Pet. App. A, pp. 8a-9a). The court of appeals also reviewed the substance of petitioner's charges against the government attorneys, and concluded that "the dearth of evidence in support of the adjudications is so plain that the accused attorneys are not to be subjected to meaningless procedure in connection with these contempt citations" (Pet. App. A, p. 13a). Because it found the circumstances of the case "exceptional," it held that "mandamus is an appropriate remedy" with respect to the order to show cause (*ibid.*).

The judgment below is correct and the questions raised by petitioner do not warrant further review.

1. Due process requires that an attorney charged with a disbarment offense be given "fair notice as to the reach of the grievance procedure and the precise nature of the charges * * *." *In re Ruffalo*, 390 U.S. 544, 552. Before judgment of disbarment may be entered, the attorney also must be afforded "ample opportunity of explanation and defence." *Ex parte Robinson*, 19 Wall. 505, 512. The court of appeals correctly concluded that these principles required reversal of the district court's disbarment order.

Petitioner contends (see Pet. 11) that the requirements of due process were satisfied by the attorneys' right to "seek relief from [the disbarment] order by written petition showing cause for the relief sought [pursuant to Local Rule 4(j)(1)]" (Pet. App. B, p. 23a). That contention is, of course, directly contrary to this Court's holding in *Ruffalo* that the attorney is entitled to "fair notice." Nor do we believe that the right to file a written petition constitutes "ample opportunity of explanation and defence." Cf. *Goldberg* v. *Kelly*, 397 U.S. 254. At least in a case such as this, involving a lawyer's substantial property interest in his right to practice law, due process requires something more than merely a post-adjudication hearing on paper. See *In re Ming*, 469 F.2d 1352, 1355 (C.A. 7).[3]

2. The court of appeals did not abuse its discretion in issuing the writ of mandamus directing petitioner to vacate his order to the government attorneys to show cause why they should not be held in contempt. The court of appeals reviewed the history of the proceedings in the district court and concluded (Pet. App. A, p. 13a):

> [T]he dearth of evidence in support of the adjudications [of disbarment] is so plain that the accused attorneys are not to be subjected to meaningless procedure in connection with these contempt citations. It would be time consuming, expensive and would hinder performance of official duties. In addition, further proceedings would continue the turmoil. It is our opinion in view of this that the mandamus is an appropriate remedy here.

[3]Petitioner suggests (Pet. 11) that the existence of the post-adjudication remedy of filing a petition for review rendered the judgment of disbarment nonfinal and therefore nonappealable. But that judgment was, as the court of appeals noted (Pet. App. A, p. 9 n. 5), unquestionably final. The existence of a right to file a petition for review under Local Rule 4(j)(2), like the existence of a right to file a motion for reconsideration under Rule 60(b), Fed. R. Civ. P., does not render nonfinal an otherwise final adjudication.

Contrary to petitioner's claim (Pet. 12), this is not a case where the extraordinary writ of mandamus was used as a substitute for an appeal. The very purpose of the issuance of the writ was to forestall further proceedings in the district court, a purpose that could not have been achieved merely by taking an appeal from a subsequent order of contempt. In view of the additional disruption that such further proceedings were likely to entail, the court of appeals acted properly in granting the writ of mandamus. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90, 95; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260; *United States* v. *Dooling*, 406 F.2d 192, 198-199 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911; *United States* v. *Igoe*, 331 F.2d 766, 769 (C.A. 7).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.